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IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

No. 774.

JAMES E. MARKHAM, as Alien Property Custodian,
Petitioner,

vs.

CONSTANTINOS G. KALLIMANIS, and CONSTANTINOS G.
KALLIMANIS, as Executor of the Will of Christ Corco-
fingas, Deceased, late of Los Angeles, California,
Respondent.

**Brief in Opposition to Petition for Writ of Certiorari
to the United States Circuit Court of Appeals for
the Ninth Circuit.**

The respondent, Constantinos G. Kallimanis, both in-
dividually and in his capacity as executor of the will of
Christ Corcofingas, deceased, wishes to resist the petition
filed by the Alien Property Custodian for a writ of cer-
tiorari in the above-entitled action, for the reason that no
grounds exist for the granting of this extraordinary writ.

Questions Involved.

It seems to us that but two questions are involved in the litigation sought to be brought before this Court:

First, was the Circuit Court of Appeals for the Ninth District guilty of an abuse of discretion in dismissing the appeal of the petitioner here after months of dilatory tactics which were resulting in damage to respondent by reason of the holding up of the administration of the estate of Christ Corcofingas, deceased, in the Superior Court of the State of California, in and for Los Angeles County?

Second, did the dismissal of such appeal by the Circuit Court of Appeals constitute a miscarriage of justice when it was brought to the attention of the Circuit Court of Appeals and it appeared clearly in the record that the material issues involved in said appeal were clearly *res adjudicata* and binding and conclusive on the appellant?

Statement of Facts.

In so far as the chronological history of this case is concerned it is set out in the petitioner's statement of the case.

At the time of the death of Christ Corcofingas on April 5, 1942, the date on which his estate would be vested in his legal heirs under the laws of the State of California, there is no dispute that, what had been at one time the Kingdom of Greece was under the complete domination and economic and military control of Adolph Hitler and the Armies of the German Third Reich. The beneficiaries named in the will of Christ Corcofingas, deceased, were with one exception living in the conquered and occupied territory that had once been the Kingdom of Greece.

Prior to the entry of the United States into the war, the Legislature of the State of California, in 1941, enacted Sections 259, 259.1 and 259.2, of the Probate Code, as cited at page 17 of petitioner's brief, which had the effect of denying to all nonresident aliens the right to inherit property in California unless, the country in which they were residing accorded similar reciprocal rights to American citizens.

Upon the filing of Mr. Corcofingas' will for probate and when the probate proceedings were ready to be closed, a proceeding to determine heirship was brought by Constantinos G. Kallimanis, respondent herein, in the Superior Court of the State of California, in and for Los Angeles County in probate proceedings then pending and over which the Superior Court of Los Angeles County had exclusive jurisdiction. (See *Silva v. Santos*, 138 Cal. 536 at 541; *King v. Chase*, 159 Cal. 420 at 424.) No question has been raised by any of the parties concerned of any irregularity in the proceedings to determine heirship brought in the Superior Court.

Upon being notified of the pending proceedings the Alien Property Custodian, through the United States Attorney for the Southern District of California, entered his written appearance in the heirship proceedings in the Superior Court [Tr. p. 64], after having obtained numerous continuances from the original hearing date of March 12, 1943 down to July 2, 1943, when the matter was finally heard. [Tr. pp. 64 and 65.] The Alien Property Custodian laid claim to the bulk of Corcofingas' estate on behalf of himself as successor in interest to the various nonresident Greek heirs. [See Tr. p. 237, and vesting order, Tr. pp. 169-171.] Testimony was taken and wit-

nesses cross-examined on behalf of his client, the petitioner herein, by the United States Attorney, who participated actively in the proceedings to determine heirship. [See Tr. pp. 220 to 245, and note the active participation of Assistant United States Attorney Clyde C. Downing in the proceedings.] After considering the evidence Superior Judge Thomas C. Gould made findings of fact and conclusions of law and a decree determining heirship in favor of Constantinos G. Kallimanis *and expressly finding that no alien had any right, title or interest in or to the estate of Corcofingas*, nor did the Alien Property Custodian of the United States, petitioner herein, succeed to or have any interest therein. [See Tr. pp. 69 and 71.] A decree was entered accordingly.

The Subsequent Proceedings.

The United States Attorney, on behalf of the Alien Property Custodian, on September 27, 1943, filed a notice of appeal to the Supreme Court of California from the decree determining heirship. On October 16, 1943, the United States Attorney dismissed the appeal in writing without reservations. On November 24, 1943, the United States Attorney filed a second notice of appeal to the Supreme Court of California, this time from the original decree and also from an order denying his motion to enter a new and different judgment. A motion was made by Constantinos G. Kallimanis in the Supreme Court of California to dismiss the second appeal, on the ground that the attempted appeal from the original decree was barred by reason of it not being taken within the time prescribed by California law (Rule 2a, Rules on Appeal) and that the order denying the motion for a new and different

judgment was not an appealable order. This motion was granted by the Supreme Court of California (See *Estate of Christ Corcofingas*, 24 Cal. (2d) 517), but not on procedural grounds as urged by petitioner on page 5 of his brief. The Supreme Court of California granted the motion on the ground that the Court lacked jurisdiction to entertain the appeal as having been taken too late. Thereafter the Alien Property Custodian attempted to obtain a writ of review (certiorari) in the Supreme Court of California, which writ was denied. [Tr. p. 87.]

In the meantime, after the trial of the proceeding to determine heirship in the Superior Court but before the entry of the formal findings of fact, conclusions of law and decree in that Court, on July 23, 1943 [Tr. p. 71], petitioner here filed an action under date of July 22, 1943, in the United States District Court for the Southern District of California, again seeking to claim the same property involved in the State Court proceedings. [Tr. pp. 2 to 6.] A motion to dismiss was filed on August 14, 1943 [Tr. pp. 7 and 8] which was followed by an amended complaint. [Tr. pp. 8 to 20.] A motion was made to dismiss the amended complaint on October 5, 1943 [Tr. pp. 20 to 22] and the Alien Property Custodian then proceeded to amend a second time. [Tr. pp. 23 to 26.] By this time the proceedings in the State Courts had been terminated by the order of the Supreme Court of California dismissing petitioner's appeal and the defendant answered the second amended complaint pleading *res adjudicata* as one of the defenses interposed to the second amended complaint. [See Tr. p. 33 *et seq.*] Thereafter respondent filed a motion for summary judgment in the District Court under the provisions of Rule 56 of the Federal Rules of Civil Procedure, urging their right to a decree by reason

of the issues having become *res adjudicata*, which motion was supported by the affidavit of Benj. S. Parks [Tr. p. 48] to which was attached certified copies of the essential documents in the proceeding to determine heirship in the Superior Court, ending with the order of the Supreme Court of California dismissing the appeal. [Tr. p. 55 *et seq.*]

Upon disposition by the Supreme Court of the petition for writ of review the record in the motion for summary judgment was further supplemented by a second affidavit of Benj. S. Parks [Tr. p. 85 *et seq.*] to which was attached a certified copy of the order of the Supreme Court of California denying the petition for writ of review.

District Judge Peirson M. Hall after a hearing on said motion thereupon on November 28, 1944, rendered judgment in favor of the defendant and respondent here, from which petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit, after obtaining a stay of execution under date of December 8, 1944. [Tr. pp. 145-46.]

From the date of Judge Hall's decision, November 28, 1944, the record shows a consistent series of delays in perfecting the appeal to the Circuit Court of Appeals and bringing the issues to a determination. After having served and filed his notice of appeal on December 8, 1944, petitioner did not designate his record on appeal for almost two months, filing it on the following January 29.¹ Counter-designations of parts of the record on appeal

¹Tr. p. 149 seems to indicate that the designation of record on appeal was filed January 29, 1944. Obviously this is an error in the record as the judgment was not entered until November 28, 1944.

were filed by respondent within ten days thereafter, February 8, 1945. Points on which the appellants intended to rely were not filed until March 6, 1945. On March 5, 1945, the Assistant United States Attorney, representing petitioner, filed an *ex parte* request with Judge Albert Lee Stephens of the United States Circuit Court of Appeals for the Ninth Circuit, and obtained an extension of time to file his record and docket his appeal to April 6, 1945, on his representation, that, although District Judge Hall had signed an order extending the time to file the record and docket the appeal up to March 7, 1945, the time was insufficient for him to properly perfect his appeal. [See Tr. pp. 286-87.] Thereafter, twelve days before the extended time expired, Mr. Downing swore to another affidavit under date of March 24, 1945, asking for another extension of time *ex parte*, on his representation, in this instance, that the case of *Allen v. Markham* was pending on petition for writ of certiorari in the United States Supreme Court and that *some of the issues involved in said case of Allen v. Markham were involved in the case at bar*. He did *not* state to the Circuit Court of Appeals, to whom this application was being made, that no issue of *res adjudicata* was involved in the case of *Allen v. Markham*, but that such issue *was* involved in the case at bar, nor did he state that there had been a final decree of heirship in favor of the appellee here, in the Superior Court of the State of California, which had long since become final by reason of the dismissal of his appeal, and which decree determined that the aliens in question or their representative, the Alien Property Custodian, had no interest in the estate. This affidavit was presented to Judge Curtis D. Wilbur of the United States Circuit Court of Appeals *ex parte and without notice to respondent*. On the strength of such affida-

vit Judge Wilbur extended the time to file the record and docket the appeal to May 7, 1945.

As a result of these repeated *ex parte* extensions, Thomas S. Tobin, one of counsel for the respondent, wrote Judge Wilbur under date of April 28, 1945, asking that we be given an opportunity to be heard on any further application for extensions on the part of the appellant. [See affidavit of Thomas S. Tobin in support of motion to dismiss appeal, Tr. pp. 308-9.] Further extensions were thereupon refused by the Circuit Court in the absence of a regular motion. [Tr. p. 315.] The statement of points on which appellant intended to rely was filed in the Circuit Court of Appeals on the last day of the extended time, May 7, 1945. [Tr. p. 297.]

The printer designated to print the record on appeal in Los Angeles, California, was designated on March 3, 1945 [Tr. p. 297] and within a short time thereafter the printer made an estimate of cost of printing the record. [See Tr. p. 322.] He was easily available to counsel for petitioner here. No copies of the printed record were served on counsel for respondent up to and including the 9th day of July, 1945 [See affidavit of Thomas S. Tobin, Tr. pp. 308-11], and more than sixty days had elapsed since the record had been docketed in the Circuit Court of Appeals after numerous extensions. The result was the filing of a motion to dismiss the appeal on July 18, 1945, supported by the affidavits of Thomas S. Tobin, Benj. S. Parks and Robert Parker, the printer. [Tr. pp. 307 to 324.] The motion sought to dismiss the appeal by reason of the dilatory tactics of the appellant, his lack of diligent prosecution of the same, and to inexcusable negligence in perfecting his appeal.

That the tactics of appellant were dilatory is clearly evidenced by the affidavit of Benj. S. Parks, one of the attorneys for appellee, in which [Tr. pp. 319-20] Mr. Parks declared on oath that the Assistant United States Attorney handling this matter twitted him with the fact that neither he nor his client would ever live long enough to enjoy any of the fruits of the Corcofinas estate. This affidavit made by a member of the bar of the United States Circuit Court of Appeals for the Ninth Circuit stands absolutely undenied, although Mr. Downing made a rather feeble counter-affidavit seeking to excuse the delay. [Tr. pp. 325-27.] At the time of the hearing on the motion to dismiss the appeal the record had still not been printed, and we do not believe that it was ever printed until the petition for writ of certiorari to this Court was under preparation.

Thus the party decreed by a final decree of the Superior Court of Los Angeles County, State of California, to be the rightful heir to the estate of Christ Corcofinas, deceased, has been delayed and obstructed from March 12, 1943, the original trial date set in the heirship proceeding in the Superior Court [Tr. p. 64] for a period of three years, before this Court will rule on the granting or denying of a writ of certiorari, as we assume there will probably be no ruling until March, 1946. All of these delays, without exception have been occasioned by the Alien Property Custodian and his counsel, through repeated requests for continuance, extensions and whatnot, and for no good reason at all, and none of them have been occasioned by any dilatory tactics on the part of respondent here.

The Law.

Was the Circuit Court of Appeals guilty of an abuse of discretion in dismissing this appeal?

Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit was promulgated for the purpose of expediting the disposition of appeals. It requires an appellant to deposit with the clerk within ten days, the amount estimated necessary to print the record. If such deposit is not made it is made the duty of the clerk to report the fact to the Court, whereupon the cause will be dismissed unless good cause to the contrary is shown. While the Government of the United States is probably excused from the necessity of making a formal deposit with the clerk to cover the expense of printing the record there is nothing in the Rule that excuses it from expeditiously procuring the printing of the same. In the case at bar no effort was made by the United States Attorney's office to obtain authority to make the expenditure until their letter written June 16, 1945. [See affidavit of Benj. S. Parks, Tr. pp. 318-19.] No reply to their letter was received by the United States Attorney until July 13, 1945 [See letter United States Attorney, Tr. p. 338], a comparatively short time prior to the preparation and filing of the motion to dismiss the appeal.

Appellant at pages 9 and 10 of his petition states that petitioner delayed thirty-five days from May 7, 1945, the last day to which the Circuit Court had extended petitioner's time to file the record, and then, only thirty-two days thereafter, before ordering the printing, thereby attempting to make it appear that these delays were minor and usual, and excusing these delays by saying petitioner was awaiting the decision in *Markham v. Allen*.

In this connection we wish to point out that the original extensions were for the purpose of allowing appellant to designate his record and have it printed, so that all of this should have been done prior to May 7, 1945, at the very latest, petitioner having had the statutory and extended time within which to do so, amounting to a total of five whole months, and then, in the face of refusal of a stipulation or further order of Court [Tr. pp. 308, 315], appellant proceeded on his own responsibility to take an additional sixty-seven days on top of the five months, or a total of in excess of seven months, just to designate petitioner's record and get it printed and filed, and then the record still was not printed or even started to be printed.² When considered in this light the Circuit Court was clearly justified in granting the dismissal, on the grounds that the delay was extraordinary.

Appellant at page 10 of his petition also refers to certain proposed amendments to the Rules to apply to government appeals, and which would recognize the petitioner's inability to move fast. We submit these Rules have not been passed, but even if they had been, we doubt if they would allow the petitioner to take more than seven months to designate petitioner's record and get it printed and filed and still not have the printing of the record started, as was the case here. We submit that the Rules of the Circuit Court were meant for all litigants, government as well as private, and that the government should abide by the Rules the same as any private litigant. To rule otherwise would create chaos.

²Note affidavit of printer, Tr. 322, in which he states he furnished oral estimate two or three months prior to June 14, and written estimate on June 14, and on July 13 still had not received order to print.

The question of whether the Circuit Court holding that the delay was unjustified for the reason advanced by petitioner for the delay, we will refer to later in discussion of the case of *Markham v. Allen*, and whether it was in any way applicable to this case.

The petitioner, at page 11 *et seq.* of his petition, refers to certain findings of the District Court, particularly referring to the finding that the Superior Court had jurisdiction of a claim of the Alien Property Custodian to property vested by him and that a decision of the Superior Court rendered the issues in the District Court *res adjudicata*. This statement does not correctly state the findings of the District Court. [Tr. pp. 121-139, incl.] The District Court did find that the Superior Court in probate did have exclusive jurisdiction to determine heirship, that is, jurisdiction to determine whether a resident and citizen of the United States (Kallimanis) or certain aliens (Greek heirs) were entitled to inherit. Until it had been determined that the Greek heirs were entitled to the estate the Alien Property Custodian had no possible right or claim to the estate or any part thereof, and the Vesting Order of the Alien Property Custodian could vest only the possible contingent interest, if any, of the Greek heirs. This clearly was not a finding that the Superior Court in probate had exclusive jurisdiction to determine a claim of the Alien Property Custodian to specific property. We do not deny that had the Superior Court by a final decree held that the Greek heirs were entitled to inherit, that the Federal District Court would then have had jurisdiction to determine the rights of the Alien Property Custodian to receive distribution to him of the estate. *In fact, we would not have contested such an order but would have*

distributed such assets to him without any Federal Court action.

The other finding complained of by petitioner refers to the finding that the Alien Property Custodian appeared on behalf of the Greek heirs. It is not necessary to advise this Court of the nature of a Vesting Order of the Alien Property Custodian. Suffice it to say that if the Alien Property Custodian had any right to the estate it was by virtue of the interest of the Greek heirs, if any, or not at all, and if the Greek heirs had no interest the Alien Property Custodian had none, and if they had any interest it belonged to the Alien Property Custodian, so the Greek heirs and the Alien Property Custodian are one and the same. If the Alien Property Custodian's contentions are correct, he has no standing in Court except as he stands in the shoes of the Greek heirs. That this is the case is conclusively shown by petitioner's statement in his petition herein that legislation is now pending to authorize the President to restore property taken by the Alien Property Custodian to the aliens. If the Greek heirs have any rights independent of the Alien Property Custodian, why is legislation necessary? It is rather absurd for petitioner to claim that this Court should grant certiorari in this case because legislation is proposed that *may* be enacted and *may* be made to apply to these Greek heirs.

The petitioner refers in his petition and sets forth in full at page 19, section 259 of the Probate Code of the State of California, as amended effective September 1945. This amendment of section 259, Probate Code, could not possibly have any effect on any of the issues involved in this case, since all of the trials and proceedings in both the State Courts as well as the Federal Courts had been fully

heard and disposed of long before this amendment became effective.

Would a miscarriage of justice result from the denial of this petition?

It is contended by appellant that momentous international issues are involved in this case which necessitate a review by this Court. He calls attention of the Court to the reversal by this Court of the case of *Markham v. Allen*, decided January 7, 1946, 66 Supreme Ct. Reporter 296. An examination of that case will indicate that the issues involved there and the issues in the case at bar were and are in nowise identical. Nowhere in the case of *Markham v. Allen* was the question of *res adjudicata* involved. That case turned purely on the question of jurisdiction of the United States District Court to entertain an action brought by the Alien Property Custodian to recover alien property.

We do not question for one moment the jurisdiction of the United States District Court for that purpose.

We do, however, submit that where another Court of competent jurisdiction, as in the case at bar, has entered a formal decree, in which both parties to the litigation in the United States District Court were parties, decreeing that one of them either has or has not any interest in the estate of the decedent, *that judgment is binding and conclusive on the United States District Court and on all other Courts of the land*. We note with interest the short special concurring opinion of Mr. Justice Rutledge in *Markham v. Allen*, in which he expresses the belief that the *Allen* case should be remanded to the District Court to *await the outcome of the pending and undetermined heirship proceeding in the Superior Court of the County in*

which the estate was being probated. We note also that in the *Allen* case, at the time of the proceedings in the United States District Court an heirship proceeding was pending untried and undetermined. In the case at bar the heirship proceeding was determined in the Superior Court, with the Alien Property Custodian participating vigorously and actively as a party litigant. It is true that the action in the District Court here was filed one day before the formal signing of the judgment of the Superior Court, but any lawyer knows that between the date of the decision of a case by a judge from the bench, and the preparation, approval as to form and signing of findings of fact, conclusions of law and a decree, some time must necessarily elapse, many times, several weeks. The action in the Superior Court was tried and concluded by oral decision from the bench on July 2, 1943, and the formal findings and decree signed July 23, 1943. The action in the case at bar was filed in the United States District Court on July 22, 1943, just one day before Superior Court Judge Thomas C. Gould signed the formal Superior Court judgment, which has long since become final. Thus we have a situation entirely distinct from that in the *Allen* case where, so far as we know, the proceedings to determine heirship have not as yet been tried. It would seem to us from the reading of the opinion of this Court that it is the Court's idea that the District Court of the United States would be required to follow the mandates of the decree of the Superior Court determining heirship. In other words, if the Superior Court probating the *Allen* estate, decrees that a German alien had an interest in that estate, that interest should be turned over to the Alien Property Custodian; but conversely, if the decree of the Superior Court should hold that no alien has any interest

in said estate, it would then follow that the United States District Court must enter a decree denying relief to the Alien Property Custodian.

The case at bar is in many respects similar to *Napa Valley Electric Company v. Board of Railroad Commissioners of California* (251 U. S. 366, 40 S. Ct. Reporter 174.) In that case an action was instituted in the United States District Court in equity by the Napa Valley Electric Company against the Board of Railroad Commissioners of California *et al.*, involving among other issues, the constitutional rights of the plaintiff. The issues had been heard and determined, previously thereto, before the Commission, with unfavorable results to the Napa Valley Electric Company. It petitioned the Supreme Court of California for certiorari, or review, and without passing on the merits of the case or filing an opinion the Supreme Court of California denied certiorari. Thereafter the Napa Valley Company instituted the action in the United States District Court against the Commission and was met with the same plea that the petitioner here was met with, namely, that the issues involved were *res adjudicata*. The District Court dismissed the bill and on appeal this Court held that the issues involved in the State Courts were *res adjudicata*. As was said by Mr. Justice McKenna:

“ . . . and we agree with the District Court that the denial of the petition was necessarily a final judicial determination based on the identical rights asserted in that Court and repeated here.”

Williams v. Bruffy, 102 U. S. 248, 255; 26 L. Ed. 135.

This Court further cited the following:

Calaf v. Calaf, 232 U. S. 371;

Hart Steel Co. et al. v. Railroad Supply Co., 244 U. S. 294,

and affirmed the decree of the District Court.

It will be noted in the case at bar that nowhere did petitioner in pursuing his delaying tactics call the attention of the Circuit Court of Appeals to the fact that the additional issue of *res adjudicata* was involved here by reason of the final decree of heirship in the Superior Court while it was in nowise involved in the *Allen* case. We believe that the Circuit Court of Appeals felt that it had been imposed upon. Judge Garrecht in his opinion points out that in the *Allen* case the Alien Property Custodian had not submitted himself to the jurisdiction of the California Probate Court but contested the same. He might well have pointed out also that nowhere in the *Allen* case was the issue of *res adjudicata* involved, as is the case here.

We submit that to grant certiorari in the case at bar would be to strip Circuit Courts of Appeal of any discretion to dismiss dilatory or non-meritorious appeals. The judgment of the lower courts herein could not be reversed without overturning the ancient doctrine of *res adjudicata*, which is as old as our law itself, and would create confusion as to the finality of any judgment or decree throughout the entire United States.

The Federal Rules of Civil Procedure were adopted for the purpose of expediting procedural steps in the perfect-

ing and prosecuting of appeals, and disregard of them will justify the Appellate Court in dismissing the appeal, either on motion or at the time of the hearing of the appeal on its merits. (See *U. S. ex rel. Rempus*, 123 Fed. (2d) 109; *Morrow v. Wood*, 126 Fed. (2d) 1021.)

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS S. TOBIN,

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